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IN THE

SUPREME COURT OF THE UNITED STATES

CITY AND COUNTY OF SAN FRANCISCO,
Petitioner,

v.

ALLEN HARMAN,
Respondent.

On Petition for a Writ of Certiorari
To The Court of Appeal of California

AMICUS CURIAE BRIEF BY LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER

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With the written consent of the parties, the League of California Cities ("League") and the California State Association of Counties ("CSAC") submit this *amici curiae* brief in support of the Petition for Writ of *Certiorari* of the City and County of San Francisco ("City").[1]

INTEREST OF *AMICI*

This employment discrimination case against the City poses the related questions whether the trial court properly awarded ***$1.1 million in attorney's fees*** to the plaintiff employee under the Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. §1988 (hereafter "§1988") and whether the appellate court properly affirmed this award although the only relief obtained was ***$30,300 in damages*** for *one of the three plaintiff employees* on *one of the multiple claims* for both damages and equitable relief under both federal and state law.

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[1] The League and CSAC (collectively, "*amici*") represent that, pursuant to this Court's Rule 37.2(a), their counsel has timely provided notice of their intent to file this *amicus curiae* brief to counsel for petitioner and respondent, and that both counsel have furnished written consent, which has been filed with the Clerk of this Court. *Amici* further represent that, pursuant to this Court's Rule 37.6, this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than counsel for *amici*, made any monetary contribution to the preparation or submission of this brief.

Because many of the cities and counties of California represented by the League and CSAC face claims for attorney's fees under §1988, and because any of these cities and counties could be subjected to similarly disproportionate awards, *amici* have considerable interest in these questions.[2]

Amici recognize that successful plaintiffs in civil rights cases brought against cities and counties are entitled to "reasonable" attorney's fees under §1988 and that these reasonable fees "are not conditioned upon and need not be proportionate to an award of money damages." *City of Riverside v. Rivera* ("*River-*

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[2] The League is an association of 478 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide—or nationwide—significance. The Committee has identified this case as being of such significance.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties and has determined that this case is a matter affecting all counties.

side"), 477 U.S. 561, 576, 116 S.Ct. 1589, 134 L.Ed. 2d 809 (1986). But, as this Court has reiterated, §1988 awards should reflect the plaintiffs' success, and, indeed, the "degree of success" is the "critical factor." *Hensley v. Eckerhart* ("*Hensley*") 461 U.S. 424, 440, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), quoted in *Riverside, supra*, 477 U.S. at 585 [conc. op. of Powell, J.] and in *Farrar v. Hobby* ("*Farrar*"), 506 U.S. 103, 144, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992).

Awarding fees under §1988 in an amount that is grossly disproportionate to any relief that plaintiffs succeeded in obtaining—as well as awarding fees for work unnecessary to obtain this relief—invites attorneys to litigate dubious claims and to overlitigate all claims. It also gives unwarranted windfalls to private attorneys at the expense of public agencies—and the taxpayers. This is not what Congress intended when it enacted §1988.

To avoid this unintended result and this potential harm to all cities and counties, *amici* urge this Court to grant the City's Petition and to hold, in answer to the specific question presented by the Petition, that the grossly disproportionate fee award made by the Superior Court for the County of San Mateo, California

("trial court") in this case was presumptively (and actually) unreasonable. Thus, the California Court of Appeal for the First District ("appellate court") was overly deferential to the trial court when it erroneously affirmed the award in its second published opinion in this case.

BRIEF STATEMENT OF CASE with SUMMARY OF ARGUMENT

In its first published opinion in this case, the appellate court properly reversed the trial court's award of $1,095,202.98 in attorney's fees, instructing that, on remand, the court "should recalculate" the award, "applying the proper standards of reasonableness" (as established by this Court in *Hensley, Riverside, Farrar* and other cases) and, in particular, "must adjust the fee to reflect the plaintiff's limited success." *Harman v. City and County of San Francisco* ("*Harman I* ") 136 Cal. App. 4th 1279, 1316, 39 Cal. Rptr. 3d 589 (2006).[3] However, the appellate court expressed "no opinion as to the amount of fees" that should be awarded on remand, leaving the amount "to the trial court's sound

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[3] The opinion in *Harman I* is found at Pet. App. 53.

discretion to be exercised in view of the governing standards." *Id.* at 1317.

On remand, the trial court failed to exercise sound discretion under the proper standards. It gave lip service to these standards, but it awarded almost all of the attorney's fees requested by plaintiff—and slightly more than it had awarded plaintiff the first time around—without the required careful scrutiny of the request and without due consideration of the degree of success. As a result, the fee award of $1,113,905.40 amounted to ***36 times*** the damages of $30,300 which the jury awarded to plaintiff and which was the only relief obtained by any of the three original plaintiffs.

Nevertheless, on the City's second appeal of the fee award, the appellate court reversed only the small portion of the grossly disproportionate award that was "based upon billings submitted for work performed on the unsuccessful attorney fee issue in the prior appeal." *Harman v. City and County of San Francisco* ("*Harman II*"), 158 Cal. App. 4th 407, 428, 69 Cal. Rptr. 3d 750 (2007).[4] The appellate court recognized the "profound" and "palpable disparity" between the relief obtained

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[4] The opinion in *Harman II* is found at Pet. App. 1.

and the fee award and expressed doubt about the propriety of such a disproportionate award and some of the trial court's findings, but the court believed its review of the award was "severely constrained." *Id.* at 425, 419, 418. It properly used the "abuse of discretion" standard of review, but it was mistaken in its application of this standard and was excessively deferential to the trial court, even indicating the award could not be reversed because it was not "so large or small it shocks the conscience." *Id.* at 428.

Granting the Petition is necessary to rectify these errors by the trial and appellate court and to clarify, not only how state and federal trial courts' discretion should be exercised when awarding fees under §1988, but also how state and federal appellate courts should apply the abuse of discretion standard of review when, as here, the plaintiffs make multiple, sweeping claims for relief, but achieve only minimal and purely monetary success on just one of these claims. A holding that grossly disproportionate fee awards like the award in this case are "presumptively unreasonable" would provide the needed clarification.

REASONS FOR GRANTING THE PETITION

I. GRANTING THE PETITION WOULD CLARIFY THAT GROSSLY DISPROPORTIONATE §1988 FEE AWARDS ARE RARELY JUSTIFIED AND SHOULD BE DISCOURAGED.

In *Harman I*, the appellate court recognized that, following the standards established by this Court for fee awards under §1988, fees should not be awarded for unnecessary work on unsuccessful claims and, where the only relief is monetary damages, the "primary consideration" in setting fees should be "the amount of damages awarded as compared to the amount sought." *Harman I, supra*, 39 Cal. App. 4th at 1314, quoting *Farrar, supra*, 506 U.S. at 114 (which, in turn, was quoting Justice Powell's concurring opinion in *Riverside, supra*, 471 U.S. at 586). This is because §1988 awards are intended to encourage attorneys to represent persons who have "legitimate civil rights grievances" and who serve "to vindicate important civil and constitutional rights" in private litigation. *Riverside, supra*, 471 U.S. at 574, 578. They were expressly not intended to produce "windfalls" for self-styled public interest lawyers, *id.* at 580, or to provide public subsidies for private lawyers, *Farrar, supra*, 506 U.S. at 121-122

[conc. op. of O'Connor, J.]. In other words, §1988 is not "a relief act for lawyers who accomplish no public goal other than occupying the time and energy of counsel, court, and client." *Id.*

Awarding fees that are grossly disproportionate to the amount of damages or that otherwise fail to give proper consideration to the degree of success provides such unintended enrichment and windfalls and, more significantly, encourages attorneys to join a multitude of claims with little or no chance of success to legitimate claims or even to file cases with only dubious claims in the hopes of uncovering at least one good claim in the course of litigation, through sweeping discovery or otherwise. This case appears to be an example of such a strategy. The original complaint was filed in federal court and asserted only equitable claims; it was only when the adverse ruling in the federal case was on appeal that plaintiff's single successful damages claim was filed in state court (along with unsuccessful damage and equitable claims of all three plaintiffs). *See, Harman I, supra*, 136 Cal. App. 4th at 1286-1287; *Harman II, supra*, 158 Cal. App. 4th at 412.

Apparently ignoring this history of this case and the purpose of §1988 fee awards, and giving little

or no consideration to plaintiff's total lack of success on his equitable claims (or the other plaintiffs' lack of success on all their claims), the trial court awarded fees 36 times the amount of damages obtained by plaintiff. Nevertheless, the appellate court affirmed this grossly disproportionate award in a published opinion.

Absent a grant of the Petition, this published opinion could encourage opportunistic litigation and wasteful overlitigation without serving the intended and salutary purpose of §1988 to encourage attorneys to represent civil rights plaintiffs who may vindicate important rights but who will have small or no monetary damages. But a grant of the Petition—and a holding by this Court that grossly disproportionate fee awards like the award in this case are presumptively unreasonable—would discourage such waste of judicial resources and public dollars without also discouraging legitimate and laudable civil rights litigation. As recognized by another California appellate court, it is in the public interest to encourage private litigation that vindicates important public rights, but "there is an equally strong civic value in discouraging civil rights claims from being overlitigated in disproportion to the dollars and constitutional interests at stake, and, 'in the process inflicting heavy costs on [the government]

opponent[s] and wasting the time of the court . . .'." *Choate v. County of Orange*, 86 Cal. App. 4th 312, 325-326, 103 Cal. Rptr. 2d 339 (2000), quoting *Hyde v. Small*, 123 F.3d 583, 585 (7th Cir. 1997), *editing by court.*

In his concurring opinion in *Riverside*—where the fee award was *seven times* the amount of the damage award—Justice Powell observed that it is only a "rare case" in which such a disproportionality between the damages obtained and the fees awarded would be justified. *Riverside, supra,* 471 U.S. at p. 586, fn. 3. This is not such a rare case, and the far greater disproportionality than in *Riverside* is neither justified nor in the public interest. Granting the Petition is necessary to make that clear.

II. GRANTING THE PETITION WOULD DISCOURAGE CURSORY TRIAL COURT REVIEW OF GROSSLY DISPROPORTIONATE FEE REQUESTS.

A grant of the Petition is also necessary to encourage state and federal trial courts to take greater care in awarding fees under §1988. Careful scrutiny of fee requests is necessary to ensure, as Congress intended, that §1988 is not subverted into a vehicle for enriching private lawyers at public expense and to

preclude "windfalls" to attorneys in the form of unwarranted and excessive attorney's fees. *See*, S. Rep. No. 94-1011, p. 6 (1976); H.R. Rep. No. 94-1558, p. 9 (1976); *see also, Johnson v. Georgia Highway Express Inc.*, 488 F.2d 714, 719 (5th Cir. 1974), which was explicitly endorsed by Congress when it enacted §1988 and which states a similar federal fee-shifting statute was not "passed for the benefit of attorneys" and should not be used "to make the prevailing counsel rich."

Careful scrutiny of fee requests is especially needed when, as here, the amount of fees requested "far exceeds" the amount of damages obtained, *Harman II, supra*, 158 Cal. App. 4th at 415, and the fee request includes much time for work on claims that did not even survive pre-trial summary review, *Harman I, supra*, 136 Cal. App. 4th at 1286-1288. But there was no careful scrutiny of the fee request after the remand in *Harman I*. Instead, the trial court awarded almost all of the fees requested by plaintiff, giving mere lip service to the appellate court's instructions and this Court's standards for awarding fees.

The appellate court explained in *Harman I* that, following the standards established by this Court for setting a prevailing plaintiff's "reasonable" fees under

§1988, the trial court must first establish the "lodestar" amount, that is, it must make an "initial estimate of a reasonable attorney's fee . . . by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate"). *Harman I, supra,* 136 Cal. App. 4th at 1307, quoting *Blum v. Stenson,* 465 U.S. 886, 888, 104 S.Ct. 1541, 79 L.Ed. 2d 891 (1984). The court should then adjust the lodestar "as necessary in the particular case." *Id.*, again quoting *Blum.* When, as here, the plaintiff failed to prevail on all claims or otherwise achieved only limited success, the court should adjust the lodestar to "award only that amount of fees that is reasonable in relation to the results obtained." *Id.* at 1308, quoting *Hensley, supra,* 461 U.S. at 440. In particular, work on unsuccessful *and unrelated* claims "cannot be deemed to have been expended in pursuit of the ultimate result achieved," and, thus, "no fees may be awarded for services" on these claims. *Id.* at 1310, quoting *Hensley,* at 435.

The lodestar calculation is appropriately further reduced to exclude work on unsuccessful *but related* claims if the relief obtained, "however significant, is limited in comparison to the scope of the litigation as a whole." *Harman I* at 1312, quoting *Hensley,* at 440. Although direct proportionality between a damage

award and an award of attorney's fees is not required, in setting fees, the court "should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation," giving "primary consideration to the amount of damages awarded" and making the "degree of success" the "critical factor." *Harman I* at 1313 & 1314, quoting *Hensley*, at 440 & *Farrar, supra*, 506 U.S. at 114.

Despite the appellate court's express instruction to follow these standards when setting fees on remand, the trial court proceeded to award fees 36 times the damages awarded on the only claim for relief that survived pre-trial dismissal. The court made no real attempt to evaluate whether work on unsuccessful claims was related to the sole successful damage claim or whether work on related claims contributed to the success of this claim, and, except for excluding a minimal amount of work from the fee request, the court simply accepted the request as "reasonable" and reflective of the "overall success" of plaintiff's attorneys' work. *Harman II, supra*, 158 Cal. App. 4th at 414, *see also, id.* at 417, stating the trial court determined that, because "the various claims against the City were inextricably intertwined," it excised very few "non-compensable" time units in attorneys' time records; *id.*

at 422-423, detailing the trial court's approval of the plaintiff's attorneys' billing judgments; *and see*, Order Awarding Attorneys Fees After Remand of Attorneys Fee Award ("Order"), Pet. App. 37.

This time around, the trial court did explain its findings and reasoning as it was instructed to do by the appellate court in *Harman I*. But the explanation falls far short of adequate justification for an award which is 36 times the damages and which is essentially the same as the award that was reversed in *Harman I*. The court's explanation is also simply not sufficient to justify an award which is essentially the same as the amount plaintiff requested before and after remand.

By affirming the award under these circumstances, the appellate court not only issued an invitation to attorneys to pad their civil rights complaints with meritless claims and to overlitigate each claim, whatever its merit, but also invited attorneys to pad their fee requests. The Petition should be granted to rescind these invitations.

III. GRANTING THE PETITION WOULD DISCOURAGE CURSORY APPELLATE COURT REVIEW OF GROSSLY DISPROPORTIONATE FEE AWARDS.

There is another compelling reason for this Court to grant the Petition and to hold that grossly disproportionate fee awards like the award in this case are presumptively unreasonable. In *Harman I*, the appellate court recognized that federal appellate courts in recent years have "display[ed] a marked restraint in approving attorney fee awards in amounts that constitute a high multiple of damages." *Harman I, supra*, 136 Cal. App. 4th at 1314-1315, citing 10 federal cases reversing or reducing disproportionate awards, including 2 cases "parallel to the present case" and 4 cases displaying a "more liberal" approach, but still reversing disproportionate awards. And, in *Harman II*, the appellate court recognized that, like the fee award in *Riverside*, "[o]n its face, the fee award [in this case] seems unreasonable." *Harman II, supra*, 158 Cal. App. 4th at 428, quoting *Riverside, supra*, 477 U.S. at 481 [conc. op. of Powell, J.]. However, the court displayed a marked—and mistaken—restraint that prevented it from disapproving this seemingly unreasonable award.

The appellate court correctly used an abuse of discretion standard to review the award, but the court mistakenly said that its review under this standard was "severely constrained" and that it must defer to the trial court's "broad" discretion unless the award "shocks the conscience." *Harman II, supra,* 158 Cal. App. 4th at 418, 411, 428. It, thus, did not carefully scrutinize the order awarding fees and simply accepted the trial court's rationalizations for awarding almost all the fees that were requested—and slightly more than the fee award that had previously been reversed.

In so affirming the grossly disproportionate award without careful scrutiny, the appellate court not only gave the trial court far too much deference, but also invited all trial courts in California to ignore the standards for fixing §1988 fees which this Court has established for state and federal trial courts throughout the country—and which the appellate court itself set forth in *Harman I.* The Petition should be granted to rescind this invitation also.

It is true that the typical attorney's fees case which comes before this Court comes from the federal trial and appellate courts, and, thus, this Court is typically establishing the standards for federal courts.

It is also true that state courts in California (and other states) can and do apply different standards when they are awarding fees under state fee-shifting statutes. *See, e.g. Graham v. Daimler Chrysler Corp.*, 34 Cal. 4th 553, 101 P.3d 140 (2000), allowing California courts to award fees under a California fee-shifting statute based on the "catalyst theory" although this Court rejected the use of this theory by federal courts in *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001). But when a state trial court is awarding fees under §1988 (or another federal fee-shifting statute), it must follow the same standards as the federal courts. And, when a state appellate court is reviewing a state trial court's award of fees under §1988 (or another federal fee-shifting statute), it must follow the guidance of this Court or the federal circuit courts of appeals. The appellate court did not follow this guidance in this case.

None of the cases cited by the appellate court for the purportedly "severely constrained" appellate review of fee awards under §1988 is a federal case. *See, Harman II, supra*, 158 Cal. App. 4th at 418, citing 8 California cases; *id.* at 427-428, citing 5 more California cases. Moreover, only one case considering fees under

§1988 is cited, and this case never elaborates on the quoted statement that California courts "review [a] trial court's award of attorney fees under section 1988 for an abuse of discretion." *Id.* at 418, quoting *Robbins v. Regents of University of California*, 127 Cal. App. 4th 653, 665, 25 Cal. Rptr. 3d 851 (2005).[5]

What is more, none of the 13 California cases cited in *Harman II* for the standard of review of a fee award indicates that it is appropriate to give great deference to a trial court on an issue like the proportionality of the award to the relief, and, indeed, none reviews a grossly disproportionate award like the award in this case. By way of contrast, the 10 federal cases cited in *Harman I* all review disproportionate awards, and they all indicate that grossly disproportionate awards should not be affirmed unless there is a clear justification for such an award.

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[5] Moreover, *Robbins* simply affirms an award of fees *to the defendants* because that appellate court "agreed" with that trial court's conclusion that the plaintiff's pursuit of the case was "unreasonable." *Id.* at 665. Interestingly, *McFadden v. Villa*, 93 Cal. App. 4th 235, 113 Cal. Rptr. 2d 80 (2001), the one case *Robbins* cites for its unelaborated statement that the standard of review is abuse of discretion reverses a §1988 award *as a matter of law* because the plaintiff in a police beating case won only on a tort claim of damages.

A grant of the Petition is necessary to ensure that California appellate courts—and the appellate courts in all the other states—follow such federal guidance in reviewing fee awards under §1988 and to clarify that grossly disproportionate awards are presumptively unreasonable and should not be lightly affirmed.

CONCLUSION

The trial court's grossly disproportionate attorney's fee award was not justified and should not have been affirmed by the appellate court. Review should be granted to ensure that, in the future, similarly disproportionate awards are not made by either state or federal trial courts and are not affirmed by either state or federal appellate courts.

Respectfully submitted,

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